No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., AND DR. LOUIS D. HYDE,
Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED

SEP 2 8 1939

PAUL P. O'BRIEN,
CLERK

BRIEF FOR APPELLANTS.

ARLIE M. FOOR,
Wolf Point, Montana,

ROBERT N. ERSKINE,
Chicago, Illinois,
Counsel for Appellants.

PRINTED BY CHICAGO LAW PRINTING CO.

SUBJECT INDEX

PAGE

Answer of City 4
Answer—Other Defendants 4
Argument 12

Bill of Complaint 3

Conflict of Jurisdiction between Judges 25
  Proceedings before Judge Pray 6, 29
  Dismissal by Judge Baldwin 7, 30

Dismissal Entered 7
Dismissal Untimely 24

Errors Relied on 8

Facts and Circumstances of Case 21
Federal Rules of Civil Procedure—
  Rule 41 15
  Rule 73 3

Instruments—Not Properly in Record 16

Master's Report 4
  Findings and Conclusions 22

Orders—
  Advisement and Partial Distribution 6
  Memorandum Decision 6
  Dismissal 7

Rules of Equity—(Nov. 4, 1912)—
  Rule 57 .... 14, 15
  Rule 70½ 25

Rule to Show Cause—
  Entry 6
  Hearing 7

PAGE

Statement of Pleadings & Facts Disclosing Jurisdiction 2
Statement of the Case 3
Summary or Argument 10

TABLE OF CASES

Appleton v. Smith, 1 Fed. Cases 1075 26
Boatman's Bank v. Fritzelen, 135 Fed. 650 27
Buck v. Felder, 208 Fed. 474 14
Buck v. Steele, 165 Fed. 577 28
Cage v. Cage, 74 Fed. (2nd) 377 18
Christen v. Superior Court of Los Angeles County (August, 1937) 9 Cal. (2nd) 526, 71 Pac. (2nd) 205, 112 A. L. R. 1153 20
Cole Silver Mining Company v. Virginia & Gold Hill Water Company, 6 Fed. Cases 72 26
Colorado Eastern Railway Company v. Union Pacific Railway Company, 94 Fed. 312 3
Commercial Union of America v. Anglo-Smith Am. Bank, 10 Fed. (2nd) 937 28
Commonwealth Trust Company v. United States, 293 U. S. 584, 79 L. Ed. 679 18
Corpus Juris, Vol. 18, 1191-1203 12
Dillon v. U. S., 29 Fed. (2nd) 246 19
Fourth Decennial Digest, Dismissal and Non Suit, Sec. 60 12
Hanna v. Brictson, 62 Fed. (2nd) 139 17
Hardy v. North Butte Mining Company, 22 Fed. (2nd) 62 28
Joyce v. McDonald, 51 Montana 163, 149 Pac. 953 20
Maison Dorin, Societe Anonyme v. Arnold, 16 Fed. (2nd) 977 (certiorari denied by United States Supreme Court, 273 U. S. 766, 71 L. Ed. 881) 14

PAGE

TABLE OF CASES (Continued).

Marias River Syndicate v. Big West Oil Company, 98 Montana 254, 38 Pac. (2nd) 599 20
Neihaus v. Morgan, 5 Cal. U. 391, 45 Pac. 255 20
Plattner Implement Company v. International Harvester Company, 133 Fed. 376 27
Presidio Mining Company v. Overton, 261 Fed. 933 (Ninth Circuit) 28
Reynolds v. Iron Silver Mining Company, 33 Fed. 354 26
Richey Land & Cattle Company v. Gladir, 153 Cal. 179, 94 Pac. 768 20
Ruff v. Gay, 67 Fed. (2nd) 684 3
Rule v. Butori, 49 Montana 342, 141 Pac. 672 20
Russell v. Texas Transport & Terminal Company, 32 Fed. (2nd) 689 19
Shreve v. Cheesman, 69 Fed. 785 27
Taylor v. Southern Railway Company, 6 Fed. Sup. 259 19
U. S. v. County Commissioners, 54 Fed. (2nd) 593 17
U. S. v. Maresca, 266 Fed. 713 28
U. S. v. Marrin, 227 Fed. 314 28
U. S. v. Sterling, 70 Fed. (2nd) 708 18
Wright v. Barnard, 264 Fed. 585 28

STATUTES

United States Code, Sec. 41—Title 28 2
United States Code, Sec. 118—Title 28 2
United States Code, Sec. 225—Title 28 3
United States Code, Sec. 230—Title 28 3

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9248

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., AND DR. LOUIS D. HYDE,
Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR APPELLANTS.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The District Court had jurisdiction.

(Section 41 and Section 118, Title 28, United States Code)

There was diversity of citizenship; the complainant, a corporation of New Jersey, had its principal place of business in Illinois and was not a resident of Montana; and the defendant, City of Wolf Point, was a municipality in and of Montana (Rec. 3-4).

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. The bill of complaint sought an accounting of the proceeds of special assessments alleged to constitute a trust fund pledged to the payment of $17,000 of outstanding bonds (Rec. 3). The answer of the City of Wolf Point admitted uncollected and delinquent assessments amounting to $7,890.08 (Par. VIII, Rec. 25), and a balance of cash on hand in the sum of $6,273.34 (Par. XI, Rec. 27). The Master's report shows that the city tendered in open court the sum of $6,710.39 (Rec. 62), and that a substantial sum remained due on delinquent assessments and from the purchase price of lots sold on tax deed (Rec. 63). The Master found that the city had on hand $11,032.24 for which it was liable, and that it was also liable for a certain additional sum (Rec. 73).

The court had jurisdiction of the defendant bondholders pursuant to said Section 118, the order of the District Court requiring such parties to appear (Rec. 34), and the voluntary appearance and answer of said defendants (Rec. 36).

The Circuit Court of Appeals has jurisdiction to review an order of dismissal for want of prosecution for the reason that it is a final appealable order.

> Section 225, Title 28, United States Code.
> *Colorado Eastern Railway Company* v. *Union Pacific Railway Company,* 94 Fed. 312.
> *Ruff* v. *Gay,* 67 Fed. (2nd) 684.

Notices of appeal from the order of February 10, 1939, dismissing the case for want of prosecution, were duly filed (Rec. 123, 131) on May 10, 1939, in accordance with Section 230, Title 28, United States Code and Rule 73 of Federal Rules of Civil Procedure. Both appellants filed appeal bonds (Rec. 124, 132).

STATEMENT OF THE CASE.

The bill of complaint herein sought an accounting of certain special assessment funds alleged to have been levied and collected by the City of Wolf Point applicable to the bonds held by complainant and others. The city was charged with the misapplication of some of such funds, with wrongful administration, and with failure to act in accordance with law for the collection and enforcement of such special assessments and for the payment of such bonds. It was further alleged that some of such assessments remained unpaid and that the lien of the assessments remained to be satisfied as to some lands. It was further alleged that the city was a trustee, the said special assessments and the proceeds thereof constituting trust funds, and that the city had in numerous respects failed in its duties and obligations as such trustee. Relief was sought by the complainant as beneficiary of such trust funds; and all other holders of bonds were made parties,

likewise as beneficiaries. The bill of complaint also alleged that all bonds, by the terms thereof, were payable in numerical order (Rec. 3-22).

The answer of the city admitted the levy of the assessments and the issuance of bonds; asserted that the bonds were payable in order of registration rather than numerically, and admitted that $17,000 of bonds remained outstanding; admitted that a substantial amount of assessments remained delinquent; admitted the collection of substantial funds with $6,273.34 on hand, but denied any misappropriation or diversion, denied all other wrongdoing and the breach of any duty as trustee, and in fact, denied that the city was a trustee with duties as such (Rec. 23-32).

The answer of defendant bondholders admitted substantially the allegations of the bill of complaint except they denied the duty of the city to call and pay in full any bonds after any installment of the assessment was in default, and it was alleged that each and all of the installments had not been collected in full but remained in partial default; that interest coupons were payable only out of interest collected on assessments, whereas, the city had paid interest coupons with principal; that bonds had no priority by reason of the number or registration, but were entitled to pro rata payments after any default; and further, that the lien of assessments remains fixed until payment in full, and that any attempts to give title to lands free and clear of such lien would constitute a taking of property and an impairment of contract contrary to certain provisions of the Constitution of the United States (Rec. 36-42).

The case was duly referred to a Special Master in Chancery who, in due course, filed his report and recommen-

dations (Rec. 43-74). This report shows extended hearings (Rec. 44-5) and a very voluminous record which "called for exhaustive calculations and extensive tabulations" (Rec. 54).

The Master found that the moneys derived from special assessments were irrevocably pledged to the payment of bonds, constituting trust funds whether the city be regarded as a trustee or as an agent of bondholders (Rec. 54); that bonds were called and paid in numerical order, and also in part in order of registration, although only a part of those registered on a particular date were called and paid (Rec. 56); that certain moneys had been diverted (Rec. 57); that there were certain irregularities or administrative failures (Rec. 60-1); and that delinquent assessments and the proceeds of tax sales remained to be collected, but that the total amount thereof would not be sufficient to pay in full all bonds (Rec. 63).

The Master held as conclusions of law that the bonds did not create a personal liability of the municipality except for funds actually collected (Rec. 64); that the funds collected constituted trust funds "to be used exclusively for the retirement of bonds and interest" (Rec. 65); that the duties of the city as to the collection of assessments were passive rather than active and that the city "is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders"; and in any event that the evidence failed to establish that bondholders have suffered any loss "by reason of the acts of the city," except as specifically declared (Rec. 66-69).

The Master's recommendations were that subsequent collections should be prorated; that the bondholders should have judgment for the amount of money on hand in the sum of $11,032.24, plus interest on certain diverted funds,

to be prorated; that the payment of such amounts should be enforced from time to time upon proper showing; and that complainant and all bondholders have judgment for costs (Rec. 72-3).

Exceptions to such report and recommendations were filed by the City of Wolf Point (Rec. 75) and by the complainant and other bondholders (Rec. 79). Hearing was had on such exceptions and the case was taken under advisement by the court pursuant to order of January 10, 1933 (Rec. 85). By such order the City of Wolf Point was required, without objection on its part, to pay in pro rata proportion upon all bonds the sum of $4,590, constituting a portion of the funds in the amount of $6,710.39 which the city admitted to hold and had tendered in open court (Rec. 86).

In due course, on May 2, 1933, the court filed a memorandum decision which approved the Master's report except as modified as to interest payable after maturity on the bonds (Rec. 87-91). There is no record of any further proceedings in the cause until January 10, 1939. All of the foregoing proceedings were had before, and every order hereinabove referred to was entered by the Honorable Charles N. Pray, as Judge of the District Court of Montana presiding at Great Falls, Montana (Rec. Orders 33, 34, 78, 82, 83, 84, 85, 87). The amended bill of complaint herein was specifically filed to the Great Falls division before Judge Pray (Rec. 3).

On January 10, 1939, the Honorable James H. Baldwin entered an order at Helena, Montana, requiring the parties plaintiff and defendant to appear before the court at Havre, Montana, on January 21, 1939, to show cause why the action should not be dismissed (Rec. 91). On the return day of such rule a written answer to such order to

show cause was filed by the attorney for defendant bondholders in their behalf (Rec. 92). The attorney for complainant appear in person, objecting to the dismissal; and tendered to the court findings of fact and conclusions of law, with a decree; whereupon the matter was taken under advisement by the court (Rec. 95-96). Thereafter on February 10, 1939, the said Judge, Honorable James H. Baldwin, lodged with the Clerk the said findings of fact and conclusions of law (Rec. 97), and the decree (Rec. 115); and filed, and there was entered an order of dismissal (Rec. 120) in words as follows:

> "Good cause not having been shown, as directed by this Court by its order of January 10, 1939, why the parties plaintiff and defendant failed to take any forward step herein for nearly six years,—that is to say from May 2, 1933 to January 10, 1939, it is ordered, and this does order, that the above entitled action be and the same is hereby dismissed.
>
> Done in open court at Havre, Montana, February 10, 1939.
>
> James H. Baldwin,
> *United States District Judge*
> *District of Montana*" (Rec. 120).

There is but one ultimate question before the court upon this appeal, and that is whether or not, under the facts and circumstances of this case, such order of dismissal should have been entered.

Errors Relied Upon.

This order of the District Court of February 10, 1939, dismissing this action as for want of prosecution, was improvidently and erroneously entered for the following reasons:

1. The cause had been fully prosecuted, and decision had been announced, with nothing remaining to be done prior to entry of decree except the entry of record of the court's findings of fact and conclusions of law, pursuant to Rule 70½ of the Rules of Equity as promulgated November 4, 1912, by the Supreme Court of the United States, and then in force.

2. Such findings of fact and conclusions of law, together with a decree, had been prepared and were before the court for appropriate entry.

3. Parties were before the court asking further appropriate proceedings and final disposition of the cause.

4. The facts and circumstances disclosed by the record as now before the court made a final disposition of the cause necessary to all parties, and it was equally the duty of the complainant and all defendants to procure entry of such findings of fact and conclusions of law, and a decree, for the following reasons:

A. The record before the court at this time includes both pleadings and the Master's report as approved by the District Court, and the correctness of the Master's report is not now at issue.

B. The subject matter of the litigation consisted of a trust fund held by the City of Wolf Point.

C. The duties and obligations of the City of Wolf Point and the rights of all parties pertaining to such trust funds were questions at issue.

D. The Master's report had presented findings, conclusions, and recommendations upon all such issues, granting relief to bondholders in some respects but absolving the city as a trustee from liability or responsibility in many other respects.

E. The city admittedly held certain funds and would collect additional funds, and the distribution of these funds was not only a question at issue but had been partially accomplished by order of court without objection from the city.

F. A dismissal of the action will leave the city, in its capacity as trustee or collecting agent, without any judicial construction of its duties and obligations but with a balance of funds on hand, after partial distribution of funds contrary to the city's concept of its duty.

G. The city had tendered to the court a certain admitted balance of funds on hand and, although such funds were left in the possession of the city, nevertheless, in legal contemplation they were within the custody and control of the court.

5. Upon the state of the record the judge who entered the order of dismissal did not exercise his power to act with sound judicial discretion.

6. The order of dismissal which was entered upon the court's own motion does not indicate whether or not it was without prejudice to any further action or adjudication.

7. The Honorable James H. Baldwin, in the exercise of the usual judicial courtesy and comity as between judges of the same court, should not have assumed jurisdiction to dismiss the action, when the cause had been fully heard before the Honorable Charles N. Pray, still a judge of said

District Court, by whom all previous orders had been entered and a memorandum decision confirming the Master's report had been filed, and who alone should enter of record findings of fact and conclusions of law, and a decree.

Summary of Argument.

The only question before the court is whether the dismissal for want of prosecution was proper.

The inherent power of the court to dismiss should be exercised with sound judicial discretion.

Decision must be made according to the facts and circumstances disclosed by the record as it stands.

There was no rule to speed and no mandatory requirement.

Rule 41 of Federal Rules of Civil Procedure not involved.

A decision on the merits after trial is the purpose of litigation.

A dismissal for want of prosecution permits another suit.

Dismissal not justified under many other decisions.

Dismissal is not mandatory even with positive statutory requirements.

Facts and circumstances of this case:

A completed trial.
Master's report approved.
Partial adjudication and distribution of money.

Decree on the merits necessary and proper for all.

Dismissal untimely and inequitable.

There should be no conflict of jurisdiction between judges of concurrent authority under rules of comity and judicial courtesy recognized by the decisions of all courts.

Litigation pending before one judge should be continued before him to a final conclusion.

A trial upon the merits, and proceedings to the point of a final conclusion, had been completed before Judge Charles N. Pray.

Dismissal for want of prosecution by Judge James H. Baldwin was improper.

ARGUMENT.

The appellants urge that it was error for the District Court to dismiss this action for want of prosecution. That is the only question now before this court. There can be no real dispute as to questions of law. We believe the decision of this court involves only the application of the law to the record now before this court. We want no misunderstanding of our position on the law.

Unquestionably, the law is that any court has inherent power, without regard even to any statute or rule of court, to dismiss any action pending therein for want of prosecution; but

The exercise of that power shall be with sound judicial discretion and not arbitrarily.

We recognize that when there is any suggestion of an abuse of discretion or arbitrary action then there is a particularly heavy burden on appellant. We accept that burden with the firm belief that a consideration of the record before the court will require a reversal of the order of dismissal to permit a termination of this litigation upon the merits of the case.

We shall make no attempt to review all decisions, even of federal courts, upon the question of the power of the court to dismiss. As disclosed by the digests of law in common use, upon the subject of dismissal (involuntary), a mass of cases can be cited sustaining such power of the court with none to the contrary (*e.g.*, 18 Corpus Juris 1191-1203 and Fourth Decennial Digest, Dismissal and Non-Suit, section 60). In passing, however, we note that

in almost all cases, wherein there was a dismissal for want of prosecution, there had been no trial on the merits whatever. We shall not impose on the court to discuss all those cases where courts have held that a dismissal was improper. Our presentation of cases will be rather for purposes of illustration in considering the record before the court, and determining why such an order of dismissal was entered, and whether it should have been entered.

The sole question before this court is whether upon the record a dismissal was justified, and our discussion must be primarily directed to the facts and circumstances of the record. We think it cannot be controverted that the record must be considered as it now stands; that is, upon the pleadings, the Master's report, and the memorandum decision of the District Court sustaining such report. Whether or not there were errors in that report, and whether or not the District Court erred in such decision, are questions not now before this court. We urge that the Master's report must be considered for the purpose of determining whether it presents a prima facie state of facts requiring a final decree thereon for the benefit of all parties.

It is true that such memorandum decision was filed May 2, 1933. From the record it appears that there was no further action of any kind by any party, or by the court, until the court on its own motion on January 10, 1939, entered an order to show cause directed to all parties plaintiff and defendant (Rec. 91). In response to such Rule a written answer was filed (Rec. 92), and counsel for plaintiff appeared in open court (Rec. 96). We submit that the written answer is not alone to be considered, nor is the fact that counsel for plaintiff objected in open court. The entire record should be examined. We may concede that the attorneys were gravely at fault in failing to bring the matter before the court for final disposition; neverthe-

less, on the return day of the Rule there was presented to the court findings of fact and conclusions of law (Rec. 97), and a decree (Rec. 115). Regardless of even unreasonable delay, the defendant, City of Wolf Point, has not been injured thereby, and it would seem important that the duties and obligations of such defendant city should be established.

No Rule to Speed or Mandatory Requirement.

We deem it proper to call to the attention of the court these facts: It is apparent from the record that there had been no Rule on complainant to proceed, and there was no trial calendar or general call on which the case appeared in regular order.

In the case of *Buck* v. *Felder,* 208 Fed. 474, the court, recognizing the inherent power of the court to dismiss, nevertheless declared (477):

> "In general, however, the practice is that a rule on the complainant to proceed in the cause, commonly called a rule to speed, must precede a motion to dismiss for want of prosecution." (Citing 14 Cyc. 448 and cases.)

In the case of *Maison Dorin, Société Anonyme* v. *Arnold,* 16 Fed. (2nd) 977 (certiorari denied by United States Supreme Court, 273 U. S. 766, 71 L. Ed. 881), it was held that where a case was dismissed on a regular call, it was not an abuse of discretion to reinstate such case on the trial calendar, even after term had expired, where the court found that the order of dismissal was entered inadvertently and worked an unjust hardship. The court there held that Rule 57 of the Rules in Equity, then in force, was not ironclad and the courts were free to exercise some discretion thereunder. Such rule provided that a case

might be dropped from the trial calendar by stipulation and upon order, but if not reinstated within the year the suit should be dismissed without prejudice to a new one. It will be observed that these provisions of Rule 57 are not contained in the Federal Rules of Civil Procedure now in force.

Rule 41—Federal Rules of Civil Procedure—Not Involved.

We would also call attention to Rule 41 of the Federal Rules of Civil Procedure now in force. Under paragraph (a) of this rule a case cannot be dismissed upon motion of plaintiff, after answer filed, "save upon order of the court and upon such terms and conditions as the court deems proper." We then particularly call attention to paragraph (b) of such rule, reading as follows:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

It will be observed that this paragraph contemplates a motion for dismissal by defendant in the event of plaintiff's failure to prosecute, and unless otherwise ordered any such dismissal is an adjudication upon the merits.

Neither Rule 41, nor any other provision of such rules, specifically contemplates a dismissal for want of prosecution upon the court's own motion, and the question is left open whether the present dismissal is without prejudice to further action. We do not pretend that the absence of any such provision in the present rules denies to the court the inherent power to dismiss, but we do believe that the nature of these new Federal Rules of Civil Procedure upon this question of involuntary dismissal emphasizes reasons why the order for dismissal now before the court should be reversed.

Documents Filed After Dismissal No Part of Record.

This dismissal followed a rule to show cause entered by the court on its own motion. Even upon the return day of such rule, it does not appear from the record that the attorney for the defendant city urged the dismissal (Rec. 95-96). However, it seems advisable at this time to comment upon certain instruments which now appear as a part of the record, consisting of a purported motion for dismissal (Rec. 143), notice of hearing (Rec. 144), affidavit of H. C. Hall (Rec. 146), and designation of record (Rec. 150). We must most respectfully urge that these instruments are no proper part of this record. The order of dismissal appealed from was entered February 10, 1939, and that order concluded the case and ended the record except as the court itself might certify any finding of fact or certificate of evidence. We think that proposition is fundamental. Pursuant to such order, notice of appeal was filed on May 10, 1939 and appellant's designation of record was filed June 5, 1939. The instruments above described (Rec. 143-150) were not filed with the Clerk of the District Court until July 5, 1939, and then without any order of court. We note in passing that the

purported notice of hearing, although directed to Robert N. Erskine, Solicitor for certain defendants, does not purport to have been served on him (Rec. 145). From the record before the court, it is clearly apparent that the said motion for dismissal which was to have been presented to the court according to the notice of hearing on May 22, 1934 was in fact never filed and never presented to the court. We submit that these purported documents are no part of the record; that the motion for dismissal, even if prepared and served, became no part of the proceedings; and that this court can give no consideration thereto. We are confident that this court can and will act only upon the legal record before the court.

A Decision on the Merits After Trial.

It seems to be the purpose of Rule 41 of the Federal Rules of Civil Procedure, and a definite tendency of all courts, to bring controversies and litigation to a definite conclusion. We take the liberty to refer briefly to decisions in two cases wherein the question at issue and the facts bear no direct analogy to the case at bar; and yet in the final result there is an analogy upon the basis that in the case at bar there has been a complete and lengthy trial with a decision on the merits. In the case of *U. S.* v. *County Commissioners,* 54 Fed. (2nd) 593, it was held that where a case had been regularly tried on evidence, it should be decided on the merits rather than dismissed without prejudice because a decree on the merits "is the purpose of litigation." Again, in *Hanna* v. *Brictson,* 62 Fed. (2nd) 139, it was held:

> "It is the duty of the courts to dispose of controversies after trial and upon their merits whenever possible. The modern tendency of both the bench and the bar is to brush aside technicalities, and to bring

about a disposition of suits, not upon some technical rule of pleading and practice incomprehensible to the lay mind, but upon the evidence and in accordance with the law."

Dismissal Without Prejudice—Another Action.

We have referred above to the question which might arise as to whether the dismissal in this case was with or without prejudice to further action. It is hardly necessary to cite authorities to establish that the general rule has been that a dismissal for want of prosecution was without prejudice, by reason of such order, to further suit on the same cause of action. In the case of *Cage* v. *Cage,* 74 Fed. (2nd) 377, the court sustained a dismissal for want of prosecution, on a regular trial call after a delay of three years and eight months, but expressly held that such dismissal did not bar a new suit; and amended the order of the District Court to affirm that it was without prejudice.

Decisions of Other Courts.

In the somewhat recent case of *U. S.* v. *Sterling,* 70 Fed. (2nd) 708, an order, denying the vacation of an order dismissing for want of prosecution, was reversed, even after the term, and the suit was required to be reinstated. The case had been dismissed on a general call under the rules of the court because of no action within a year. However, the case had been referred to a Master and fully tried, some years previously, and, indeed, had been awaiting a Master's report. The Circuit Court of Appeals held that under the circumstances it was not subject to dismissal for want of prosecution, and the United States Supreme Court denied certiorari (*Commonwealth Trust Company* v. *United States,* 293 U. S. 584, 79 L. Ed. 679).

It seems perfectly apparent, from numerous decisions, that lapse of time alone is not a conclusive reason for dismissing an action for want of prosecution. The question of whether the defendant has been in any degree prejudiced, and all of the circumstances of the particular case, must be considered to determine whether or not the trial court has acted with truly sound judicial discretion in dismissing solely for want of prosecution. As examples, we also cite:

> *Taylor* v. *Southern Railway Company,* 6 Fed. Sup. 259.
>
> *Russell* v. *Texas Transport & Terminal Company,* 32 Fed. (2nd) 689.

In a case before this court, *Dillon* v. *U. S.,* 29 Fed. (2nd) 246, it was held that an order of dismissal was not subject to be vacated after the term. Such dismissal was upon a general call, for want of prosecution, pursuant to a rule providing for dismissal where no action was taken for a year; but, with reference to such rule, this court said in concluding its opinion:

> "True, the court is not bound to dismiss under the conditions specified in the rule, but it may do so in the exercise of its sound discretion."

We think it would be entirely improper to discuss at length the decisions of the several state courts on the general question of dismissal for want of prosecution. Needless to say, they vary widely in their holdings, and sometimes because of the statutes and rules of court in the particular state. Some states have very definite statutes on the subject, and this includes California and Montana; it appears that much litigation has resulted from such statutes. We comment on these states (the Montana Code having followed the California Code) with the thought that

this case comes from Montana, and it may be possible that the judge who entered the dismissal was unconsciously influenced by his knowledge of the statutory provisions.

A study of many Montana and California decisions leads to the conclusion that even where provisions of the statute seem mandatory, they are not strictly construed, and many implied exceptions are recognized. It was so held in the recent case of *Christen* v. *Superior Court of Los Angeles County* (August, 1937), 9 Cal. (2nd) 526, 71 Pac. (2nd) 205. This case is also found in 112 A. L. R. 1153 with an extensive note on the subject matter, and we call attention to the citations, particularly at page 1169, to the effect that where an action is partially tried, it does not come within the terms of the statute. In these states the statutory provisions include the requirement that a judgment shall be entered within six months of a finding or entry of verdict, but these provisions have also been broadly interpreted.

Rule v. *Butori,* 49 Montana 342, 141 Pac. 672.

Richey Land & Cattle Company v. *Gladir,* 153 Cal. 179, 94 Pac. 768.

Neihaus v. *Morgan,* 5 Cal. U. 391, 45 Pac. 255.

In the case of *Joyce* v. *MacDonald,* 51 Montana 163, 149 Pac. 953, although eight years had elapsed with no judgment on the finding, the court held that the case should not be dismissed because all parties were entitled to some affirmative relief. So in the case at bar, the report of the Master, as confirmed, made numerous findings in favor of the defendant city as well as in favor of bondholders.

We also call attention to the case of *Marias River Syndicate* v. *Big West Oil Company,* 98 Montana 254, 38 Pac. (2nd) 599, where it was specifically held that the six months' period within which a final order must be entered under the Montana statute did not begin to run until noth-

ing more remained to be done than the mere entry of the judgment. It was there held that where the findings had not been completely and correctly adopted, then the case was still in the process of judicial determination. So in this case while a memorandum decision was filed confirming the Master's report, complete findings of fact and conclusions of law were not specifically adopted by the trial judge.

Facts and Circumstances—This Case.

We shall now ask the court to consider the nature of this case, and all pertinent circumstances as disclosed by the record. In our statement of the case, *supra,* we have reviewed briefly the pleadings and the master's report. We pointed out that upon the trial there were extended hearings and a voluminous record. The report of the Master (Rec. 43-74) was a comprehensive and detailed consideration of all issues in the case, and prompted the District Judge, who confirmed such report, to specifically comment on the painstaking efforts of the Master (Rule 88). We earnestly urge that these are considerations which should have great weight in determining whether the results should be entirely held for naught. The record which has been made by great effort of all parties should not be wasted; in equity it is for the benefit of all parties. At this time it is not a question of whether the Master was right or wrong in his conclusions, or whether Judge Pray was right or wrong in confirming the Master's report. Errors, both of findings of fact and conclusions, can be corrected at the proper time. The question now before the court is whether the entire record shall be discarded and rendered useless, with no decree upon the merits, as a result of the dismissal of the action. May we suggest briefly some of the issues in the case which seem to require that the court, sitting in equity, shall render a final decree upon the merits.

It has been repeatedly held that a court of equity takes a complete and peculiar jurisdiction in the matter of trusts, the administration thereof, and the rights, duties, and obligations of both trustee and beneficiary. We are not asking this court at this time to pass upon any of such questions in this case. Perchance, the court might eventually decide that no trust was here involved. The fact remains that upon the face of the present record, trust issues are involved.

The Master made findings and conclusions as follows:

> Monies derived from special assessments are pledged to payment of bonds, and in that sense are trust funds, whether the city is regarded as a trustee or as an agent for bondholders (Rec. 54, 65).
>
> The issue was presented whether bonds should be paid in numerical order, or in order of registration, or in prorata proportion (Rec. 55).
>
> The burden was on complainant, to include the accounting (Rec. 54-55).
>
> Records were inadequate (Rec. 60).
>
> Certain funds were tendered by the city in open court (Rec. 62).
>
> There will not be a sufficient amount collected to discharge the bonds in full (Rec. 63-66).
>
> There was no general liability of the city upon the bonds as such (Rec. 64).
>
> The duties of the city are passive, not active (Rec. 66-69).
>
> After maturity when funds are insufficient for payment of bonds in full, then all monies should be paid in pro rata proportion (Rec. 70, 72).
>
> Future action of the court, relating to administration and payment of funds, may be necessary (Rec. 72-73).

A substantial sum of money on hand and due from the city should be prorated among bondholders (Rec. 73).

Delinquent assessments and proceeds of tax sales remained to be collected and distributed subsequent to the accounting (Rec. 63, 72).

Decree Pertinent.

We submit that if the Master was wrong in such findings and conclusions against the city, then most certainly the city is entitled to a conclusive adjudication in its favor absolving it from duty and responsibility; but in equity, if the Master was correct, bondholders are entitled to their rights as beneficiaries of the trust. The entry of a proper decree is of interest to all parties.

Regardless of the amount which the Master found to be on hand (Rec. 73), the fact remains that the city did collect special assessments applicable to bonds and admitted a balance on hand which was tendered to the court (Rec. 62). Subsequently, by order of court, a part of such funds was distributed to bondholders (Rec. 85-87), and to that extent there has been a partial adjudication. The balance of such funds are, in effect, in *custodia legis;* the city has not claimed such balance, and the distribution thereof must be determined. We submit that a court would not permit a receiver to retain funds on hand, by dismissal of a Bill of Complaint without settlement from the receiver. The order for partial distribution, entered by Judge Pray without objection from the city, creates a situation which requires a final decree upon the merits.

In addition to such balance of admitted funds, perhaps commingled therewith, there may be the proceeds of delinquent assessments and tax sales which the Master found

to be uncollected (Rec. 63). The accounting herein was only brought down to a date named, and if there have been subsequent collections they would likewise be a part of the trust funds applicable to payment of bonds. The Master recommended that any such moneys should be prorated among bondholders (Rec. 72). If there be any such additional moneys at any time collected, then it is the more important that the rights of all parties therein be fixed and determined by a decree on the merits.

The issue was distinctly raised as to how bonds should be paid (Rec. 55). Not only did the Master conclude that funds should be prorated upon all outstanding bonds, but the court, by its order of partial distribution (Rec. 85), required such payment; and it was made. The order shows that the city made no objection thereto (Rec. 86), although this method was contrary to the contentions of the city. We now face a situation where payment has been made by the city pursuant to an order of court, but if the dismissal of the action is permitted to stand, such order will be void. How, then, would the balance of funds be distributed, or, perchance, what then will be the liability of the city upon the bonds? What will be the respective rights of both city and bondholders? Both are entitled to a final decree upon the merits.

Dismissal Untimely and Inequitable.

We submit that the very nature of this case, the proceedings that have been had herein, the orders entered in the course of such proceedings, all lead to but one conclusion; a final decree upon the merits is necessary and proper. A great injustice will be done to all parties if such decree be not entered. The mere dismissal of the case, under present circumstances, creates an impossible and highly inequitable situation. The order of dismissal for want of

prosecution is an anachronism; the case has been fully prosecuted and the time for dismissal is past. At the time of the order of dismissal it was in the hands of the court itself for entry of findings of fact and conclusions of law, with a decree thereon. We respectfully submit that the order of dismissal, upon the record of the case before the court, was improvident and apparently inadvertently entered without a proper understanding of the situation. Accordingly, it should be set aside so that further appropriate proceedings may be had.

Conflict of Jurisdiction Between Judges.

There is another and very cogent reason why the order of dismissal in this cause should be reversed and set aside. That order was entered by the Honorable James H. Baldwin pursuant to a rule to show cause, also entered by him. Perhaps we cannot question the technical power to act of Judge Baldwin, but we feel that his action was certainly inadvertent. The case had been pending before the Honorable Charles N. Pray, who was still a judge of the said District Court; numerous orders had been entered by Judge Pray, including a partial adjudication with distribution of money; and a memorandum decision had been filed pertaining to the merits. We think it follows, as a matter of course, that Judge Pray alone could be called upon to enter of record findings of fact and conclusions of law in accordance with Rule 70½ of the Rules in Equity, then in force, and eventually a decree.

This question of the authority of coordinate courts and judges has been the subject of many judicial comments and holdings. It will be recalled that in the earlier days of our federal courts members of the Supreme Court sometimes sat within the respective circuits to which they were assigned, and there might be in the same court a

circuit justice, a circuit judge, as well as a district judge. This difference between the judges was the basis for some question. In the case of *Appleton* v. *Smith,* 1 Fed. Cases 1075, Circuit Justice Miller, when asked to rule on a motion previously denied by a district judge, said:

> "It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to another."

Again in the case of *Cole Silver Mining Company* v. *Virginia & Gold Hill Water Company,* 6 Fed. Cases 72, Circuit Justice Field said, when asked to vacate an injunction entered by the district judge:

> "I could not with propriety reconsider his decision even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflict if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

Judge Brewer in the case of *Reynolds* v. *Iron Silver Mining Company,* 33 Fed. 354, made these comments:

(356) "I think that the orderly administration of justice requires, and justice itself will in the long run, and the general average be best secured, if litigation commenced before one judge continue before him until it shall be taken to an appellate tribunal."

(357) "And in conclusion it is wiser and better that the litigation commenced before one judge shall be continued, so far as practical, before him to its close in the trial court."

It seems to be the universal rule that as between courts, as such, where they are of equal jurisdiction, the one court will not disregard or overrule the other; and the reasoning which induces such a rule applies equally to judges of equal jurisdiction. In the case *Shreve* v. *Cheesman*, 69 Fed. 785, the court said in discussing the question at page 790 that it is a:

> "Principle of general jurisprudence that courts of concurrent or coordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action."

And at page 791:

> "Nor has it been thought less vital to a wise administration of justice in the federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice except for the most cogent reasons."

In the case of *Plattner Implement Company* v. *International Harvester Company*, 133 Fed. 376, the court said at page 378:

> "This rule in *Shreve* v. *Cheesman* is a rule of comity and of necessity * * * the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases."

We observe that the opinion in *Shreve* v. *Cheesman* was again quoted in the case of *Boatman's Bank* v. *Fritzelen*,

135 Fed. 650, where the Circuit Court of Appeals for the Eighth Circuit reversed an order remanding a case to the state courts when another district judge had previously refused to remand the case. The court said that it was another illustration of the wisdom of the rule.

We observe with interest this definition of "comity" in a case of a somewhat different nature. We refer to the case of *U. S.* v. *Marrin,* 227 Fed. 314, where the court said:

> "It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with courts and cabinets, in law and in diplomacy, substantially the same purpose which personal courtesies serve in the social relations of life. One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other."

Substantially to the same effect are the following cases, to the language of which we specifically call the court's attention, but it seems unnecessary to enlarge this brief by specific discussion and quotation from each of them:

Buck v. *Steele,* 165 Fed. 577 (584).
Presidio Mining Company v. *Overton,* 261 Fed. 933 (Ninth Circuit) (Cases cited—p. 939).
Wright v. *Barnard,* 264 Fed. 585.
U. S. v. *Maresca,* 266 Fed. 713.
Commercial Union of America v. *Anglo-Smith Am. Bank,* 10 Fed. (2nd) 937.

A somewhat similar question has been before this Circuit Court in another case coming from the Montana District, and we observe that the court cited as authority some of the cases which we have referred to above. It is the case of *Hardy* v. *North Butte Mining Company,* 22 Fed. (2nd) 62, where one of the judges of the district court

of his own motion entered a rule to show cause, dismissed a bill of complaint and ordered the discharge of a receiver appointed by one of the other judges. This court said as to the sole question for decision:

> "May another judge sitting in the same court, on the same record, of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly or improvidently made. On both principle and authority the question must be answered in the negative."

Proceedings Before Judge Pray.

As we have heretofore commented, this case was filed in the Great Falls Division addressed to the Honorable Charles N. Pray because he was there sitting (Rec. 3). From time to time at least seven different orders were entered by Judge Pray (Rec. 33, 34, 78, 82, 83, 84, 85). Exceptions to the Master's report were heard by Judge Pray. The case was taken under advisement by him upon the merits, pursuant to his order, and it will be noted that such order made a partial adjudication by requiring distribution of certain moneys (Rec. 85-87). Judge Pray made his decision upon the merits as found in his memorandum decision by which he substantially sustained the Master's report (Rec. 87-91).

The record clearly discloses that the question of a dismissal for want of prosecution was never presented to or considered by Judge Pray. It is certainly an open question, in view of the partial adjudication and the hearing upon the merits, whether Judge Pray would have entertained any such motion for dismissal. If it appeared that the case had been pending for an undue period of time, it would have been a simple matter for all parties to have been required to appear before Judge Pray.

Dismissal by Judge Baldwin Improper.

In conclusion it is respectfully submitted that under the established rule universally recognized in our federal courts, Judge Baldwin should not have assumed jurisdiction and made a final disposition of the case by an order dismissing for want of prosecution. That was an interference with the jurisdiction of Judge Pray. The question of what should be done in the matter, even if it were considered that there was an unseemly delay, was definitely a question for Judge Pray, whose province it was at the time to bring the matter to a proper conclusion. There had been a hearing upon the merits by Judge Pray, there had been a partial adjudication, there had been a decision. All of the facts and circumstances of the case, with which Judge Pray was entirely familiar, were proper to be considered in determining what action the District Court should take. If a motion to dismiss for want of prosecution was in order, such motion might be properly considered by the judge who was intimately acquainted with the proceedings. We urge that, upon the record of this case, the order of dismissal entered by the Honorable James H. Baldwin must and should be reversed.

Respectfully submitted,

Arlie M. Foor,
Robert N. Erskine,
Counsel for Appellants.